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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 922

WITHLACOOCHEE RIVER ELECTRIC COOPERATIVE, INC., VALENCIA RESTAURANT & MOTEL, INC., AND SOUTHERN LEASING, INC.,

Petitioners,

v.

TAMPA ELECTRIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

Counterstatement of Questions Presented

The short answer to petitioners' statement of the "Questions Presented" is that no federal question of any kind is presented by the record in this case.

In the first place, the Supreme Court of Florida did not construe the Florida statute as precluding a cooperative from serving persons to whom central station service is "available", as repeatedly asserted by petitioners. On the

contrary, all the Florida courts did was to decide a simple question of fact: That Withlacoochee was attempting to serve customers previously being adequately served by respondent Tampa Electric Company, in violation of the plain language as well as the spirit of the Florida Rural Electric Cooperative Act—a holding which clearly does not raise any federal question.

In the second place, even if the Supreme Court of Florida had construed the Florida statute in the manner asserted by petitioners this would not have raised any federal question: For what petitioners are complaining about is that after they had invested money and entered into contracts in reliance upon their construction of a State statute adopted many years earlier, the Supreme Court of the State held that their construction of the statute had been erroneous. Such a court decision clearly cannot constitute either an unconstitutional deprivation of property or an impairment of the obligation of contracts.

Finally, a provision in the State statute authorizing the formation of electric cooperatives which defines and limits the categories of customers which such a cooperative is authorized to serve can hardly be deemed a denial of equal protection of the laws.

Respondent's Statement of the Case

The Valencia Case

In 1957 respondent Tampa Electric Company commenced serving electricity to Clary Oldsmobile Company, a repair shop and automobile agency situated on premises on the west side of Route 301 about one mile south of Dade City in Pasco County, Florida (Tr. Valencia 4,

76).* On 1958 petitioner Valencia Restaurant & Motel, Inc. (hereinafter "Valencia") was organized, took over the property of Clary Oldsmobile Company, and commenced remodeling the existing buildings and constructing new buildings on the same premises (Tr. Valencia 70-72). On August 20, 1958 at the request of Valencia's building contractor, E. M. Covington, respondent transferred the account for the electric service previously rendered to Clary Oldsmobile into Covington's name (Tr. Valencia 71, 74, 76). This service to Valencia's property was still being rendered not only at the time the temporary injunction was issued but also at the time of the trial which resulted in a permanent injunction (Tr. Valencia 78).

In November 1958 while the said electric service was being rendered to Valencia's buildings, petitioner Withlacoochee River Electric Cooperative, Inc. (hereinafter "Cooperative"), entered into a contract with Valencia to serve it with electricity (Tr. Valencia 54-56) and built a distribution line of approximately 12,600 volts over a distance of approximately 4 miles through territory served by respondent to the Valencia location (Tr. Valencia 5). Respondent thereupon filed its complaint (Tr. Valencia 4-8) alleging the foregoing facts and contending that they constituted a violation of the provisions of Section 425.04 Florida Statutes, providing that:

> "... no cooperative shall distribute or sell any electricity or electric energy to any person residing within any town, city or area which person is receiving adequate central station service or who at

*We shall follow the procedure adopted by petitioners. References to the record in the *Neighbors Leasing* case will be marked "Tr. ..." while references to the record in the *Valencia* case will be marked "Tr. Valencia ..."

the time of commencing such service, or offer to serve, by a cooperative, is receiving adequate central station service from any utility agency, privately or municipally owned individual partnership or corporation."

The Circuit Court, Pasco County, Florida, issued a temporary injunction *ex parte* on November 17, 1958 (Tr. Valencia 9) and denied Cooperative's motion to dissolve the temporary injunction on December 2, 1958.

The Southern Leasing Case

Since prior to 1956, two individuals named David A. Lindsey and Ronald J. Chapman had been and, at the time of the trial, still were engaged in the trucking business and also in the truck brokerage business in the area of Dade City, Florida, as the local representatives of Clay-Hyder Trucking Lines (hereinafter "Clay-Hyder") (Tr. 4, 76, 79). Under the name of Lindsey & Chapman, a partnership, they operated their brokerage business as well as the local office of Clay-Hyder (Tr. 4, 76). Under the name of petitioner Southern Leasing, Inc. (hereinafter "Southern Leasing"),* a corporation, they owned a fleet of tractors and trailers which they leased to Clay-Hyder (Tr. 77).

These various activities were carried out on premises located on Route 301 three-quarters of a mile north of Dade City, standing in the name of Southern Leasing (Tr. 4). Respondent has furnished all electric power for all the activities carried out on these premises since

*Of 410 shares of Southern Leasing stock outstanding David Lindsey owned 150 shares, Chapman owned 150 shares, Kenneth W. Lindsey owned 100 shares and William A. Ross owned 10 shares. David Lindsey was President, Chapman First Vice President, Kenneth Lindsey Second Vice President, and Ross Secretary (Tr. 4, 5).

April 16, 1956, the account standing on respondent's books in the name of Lindsey & Chapman (Tr. 5, 73, 76).

In 1958 construction was commenced by Lindsey and Chapman on a larger building on the westerly portion of the above-described premises, such building to be used primarily to house Southern Leasing's maintenance shop (Tr. 5, 77). After such construction had begun, David Lindsey opened discussions with Earl W. McGough, Vice President and General Manager of Cooperative. These conversations culminated in an agreement by Cooperative to furnish electricity to the new building in the name of "Southern Leasing" (Tr. 85), rather than in the name of "Lindsey and Chapman", under which all Southern Leasing's activities were at that time being served by respondent, and notwithstanding the fact that respondent was ready and willing and had offered to render such service from its lines which were then serving the existing buildings on the same property (Tr. 51). In order to comply with this agreement, Cooperative extended its lines for some 3/8ths of a mile from a point west of the aforementioned property, crossing over the lines of respondent, and commenced service to said new building in the name of Southern Leasing on the 28th day of January, 1959 (Tr. 6, 84, 85, 87).

Thereafter respondent sought and on the 3rd day of February, 1959 obtained a temporary restraining order (Tr. 41). Cooperative's motion to dissolve the said restraining order was denied on February 20, 1959. Thereafter on May 15, 1959 respondent "cut in" electric service to the said new building, the account standing originally in the name of Lindsey & Chapman (Tr. 69). Subsequently that account was changed into the name of Dade City Truck and Equipment Company, another corpo-

ration owned and operated by Lindsey & Chapman, and service was still being rendered under that name at the time of the trial leading to the permanent injunction (Tr. 69, 70).

The Proceedings in the Florida Court

Cooperative appealed to the District Court of Appeal, Second District from both temporary injunctions. That Court in a single opinion (Pet. App. A, p. 26)* held that, under its construction of an earlier decision of the Supreme Court of Florida, *St. Joseph Telephone & Telegraph Co. v. Southeastern Telephone Co.*, 149 Fla. 14, 5 So.2d 55 (1941), respondent had no standing to bring a proceeding for an injunction because it was complaining of an *ultra vires* act by petitioner which could only be attacked in a direct proceeding by the State. Respondent took the cases to the Supreme Court of Florida which reversed, holding that the District Court of Appeal had misconstrued the *St. Joseph* case (Pet. App. B, p. 43). Noting that the District Court itself had pointed out that "the basis for the Chancellor's findings was that the corporation is but the *alter ego* of a partnership on adjoining land which Tampa was at the time serving" (Pet. App. B, p. 45), the Court concluded:

> "It is our opinion that the complaint in this case sufficiently alleges that the cooperative in these cases has used its preferential economic advantage as a means of *extending its service to customers previously being adequately served by Tampa Electric*. Such activity exceeds not only the funda-

*Reference to the petition for certiorari herein will be marked "Pet. ___"; references to the Appendices annexed to the petition will be marked "Pet. App. ___, p. ___".

mental underlying purpose which motivated the establishment of the rural electrification program, *but also it violates the plain language as well as the spirit of Section 425.04, F.S.A.*" Further, we are in accord with the petitioners and Associate Judge Murphree in their conclusion that the cooperative's activities are tantamount to an unlawful injury or interference of Tampa Electric's property rights." (Pet. App. B, p. 47) (Emphasis added).

Thereafter the two cases were consolidated and remanded to the Circuit Court for Pasco County for trial on respondent's demand for a permanent injunction. Before the trial, petitioners Valencia and Southern Leasing were permitted to intervene. After trial a final decree was entered by the Circuit Court on September 29, 1961 in which the Court found "that the plaintiff has sustained the allegations of its complaint by competent proof and is entitled to the relief prayed for." Accordingly, the temporary injunction was made permanent.

On the second appeal to the District Court of Appeal, Second District, that Court reviewed the evidence presented to the trial court, found "that it fulfills the prohibitive requisites, as was found by the chancellor", and affirmed (Pet. App. D, p. 50).

The Supreme Court affirmed, saying:

> "As a matter of fact, the District Court's decision is consonant with our prior decision in the instant suit. In that decision we merely held that the complaint stated a cause of action and if the allegations of said complaint were proven Tampa Electric would be entitled to the relief which it sought. Upon remand testimony was taken and a final decree favorable to Tampa Electric was entered. In the final decree the Chancellor made the follow-

in a finding: " * * the plaintiff has sustained the allegations of its complaint by competent proof and is entitled to the relief prayed for. * * *". This decree was affirmed by the District Court of Appeal Second District." (Pet. App. E, p. 62)

The present petition seeks a review of that decision.

ARGUMENT

I

No federal question is raised by the petition and record in this case.

The petition is based entirely on the assertion that the Supreme Court of Florida construed the Florida statute as precluding service by a cooperative to any customer to whom central service was "available". We submit that it is plain from the foregoing statement as well as from the opinions of the Supreme Court of Florida annexed to the petition that no such construction was placed on the statute at all. On the contrary, the court simply looked through the corporate veil in the *Southern Leasing* case, holding that Lindsey & Chapman and Southern Leasing were the same "person" within the meaning of the Act, and that service to Valencia's buildings while they were under construction was service to Valencia even though standing in the name of Valencia's contractor. As the Supreme Court of Florida said, "Such activity * * * violates the plain language as well as the spirit of Section 425.04, F.S.A." (Pet. App. B, p. 47). Obviously, such a factual determination by a State Court cannot raise a federal question.

As is quite apparent from the face of the petition itself, petitioners are really contending that certain philosophical comments contained in a footnote to the opinion of the Supreme Court of Florida regarding the purpose of the federal act (which was not in issue in any way), as well as certain comments on this footnote made extemporaneously from the bench at the close of the trial by the trial court, and which are quoted at length three separate times in the petition (Pet. pp. 11-12, 17-18, and 52-53), "permeated" and therefore constituted the true basis of the Supreme Court's decision. This contention, which had also been advanced by petitioners before the Supreme Court of Florida itself in the argument on the second appeal, was summarily disposed of by that Court in the following words:

> "It should be perfectly clear even to a novitiate that the remarks contained in said footnote were unnecessary to the decision which we reached, were not pronouncements of law but merely philosophical observations, and constitute nothing more nor less than obiter dicta. *They should be so treated by the bench and bar.*" (Pet. App. E, pp. 62, 63). (Emphasis added)

It comes as something of a surprise, in view of this authoritative injunction by the Court itself, that petitioners should now have the temerity to assert in this Court that the remarks contained in said footnote did constitute the *ratio decidendi* of the Florida Court's decision.

II

Even if the Supreme Court had construed the Act as claimed by petitioners, no federal question would be raised.

It is plain from the petition itself that what petitioners are really complaining of is that they invested money and entered into contracts in reliance upon their belief that Southern Leasing was not the same "person" as Lindsey & Chapman, and Valencia's building contractor was not the same "person" as Valencia, within the meaning of the Florida statute. The Supreme Court having held otherwise, petitioners now find that their investments are valueless and their contracts void and claim that this result is a violation of their constitutional right. Surely, such a state of facts cannot constitute either the passing of any "law impairing the obligation of contracts" or the deprivation of "any person of . . . property without due process of law" in violation of the relevant provisions of the Federal Constitution.

Moreover, this would be so even if the Florida courts had gone further than necessary in deciding these cases and had held that the Act did forbid cooperatives from serving any customer to whom central service was "available". As petitioners concede, the construction of a State statute by the State Supreme Court is binding and, of course, it follows that that was the meaning of the statute from the time of its enactment. Surely it is not the law that every time a court holds that a person has invested money or entered into contracts under a misapprehension as to the meaning of a statute, his constitutional rights have been impaired.

III

A state statute authorizing the establishment of rural electric cooperatives and defining the category of customers which such cooperative may serve can not constitute a denial of equal protection of the laws.

Petitioners concede that "it is not the language of the Florida statute itself which is unconstitutional, but the erroneous interpretation which the Supreme Court of Florida has given it * * *" (Pet. p. 8). In other words, they concede that a statute which forbids rural electric cooperatives to serve persons who are already receiving adequate central service from another electric utility does not deprive such cooperatives of the equal protection of the laws. It is difficult to see what difference it makes whether the limitation is restricted to "persons who are receiving adequate central service", or to "persons to whom adequate central service is available". In either case, electric cooperatives are limited by the statute under which they were created to certain defined categories of service. It is absurd to call such a limitation a denial of equal protection of the laws.

IV

Petitioners' remaining contentions are completely without merit.

Petitioners' contentions that the alleged refusal of the state courts to consider the legislative history of the Act constitutes a lack of due process, as well as their request that this Court consider and determine the meaning of the Federal Rural Electrification Act of 1936, are so

plainly lacking in merit, as well as irrelevant to any issue presented by the record in this case, as to require no further comment.

CONCLUSION

The petition for a writ of certiorari herein should be denied.

Respectfully submitted,

WILLIAM C. CHANLER,
Attorney for Respondent.

Of Counsel:

SAM BUCKLEW,
D. FRED McMULLEN.

Dated: May 14, 1964.